Chapter 2 Authority and Restrictions

2.1 The ombudsman system is intended to be an alternative to judicial remedies in redressing citizens' grievances against public administrators. Appointed by the Chief Executive of the Hong Kong Special Administrative Region under The Ombudsman Ordinance ("the Ordinance"), Cap 397 Laws of Hong Kong, The Ombudsman has statutory authority to operate independently and freely without fear or favour. The Ombudsman is subject to scrutiny by the courts through judicial review.

Powers and Functions

2.2 We investigate complaints of maladministration by Government departments and public bodies listed in Schedule 1 to the Ordinance:

- to seek out the facts for justice and redress; and
- to improve the quality and efficiency of public administration.

Since 1994, The Ombudsman can also initiate direct investigation without complaints (see **Chapter 3**).

Powers of Investigation

2.3 The Ordinance empowers The Ombudsman to inquire into a complaint unless it is outside her jurisdiction or otherwise restricted under the Ordinance (see **paras. 2.13 – 2.15**). Inquiry may be by preliminary inquiries or by full investigation.

2.4 Under section 11A of the Ordinance, The Ombudsman may conduct preliminary inquiries into a complaint before deciding whether a full investigation is warranted. Section 11B empowers The Ombudsman to deal with complaints by mediation with consenting parties. Details of our preliminary inquiry and mediation service are set out in **Chapter 4**.

Fig. 2.1

Definition of Maladministration – section 2 of the Ordinance
"Maladministration" means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes –
(a) unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action;
(b) abuse of any power (including any discretionary power) or authority including any action which – (i) is unreasonable, unjust, oppressive or improperly discriminatory or which is in accordance with a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory; (ii) was based wholly or partly on a mistake of law or fact;
(c) unreasonable, unjust, oppressive or improperly discriminatory procedures

2.5 Full investigation into complaints is empowered by section 7 of the Ordinance. The law requires The Ombudsman to notify the organisation(s) concerned before commencement of a full investigation. Where preliminary inquiries or mediation point to the need for a full investigation, the parties to the complaint will be so informed.

2.6 The Ombudsman determines whether a complaint is subject to her jurisdiction. Where The Ombudsman considers it in the public interest to do so, she may continue with an investigation even if the complainant has withdrawn his or her complaint.

2.7 Like ombudsmen elsewhere, The Ombudsman has extensive investigative powers. Section 13 of the Ordinance provides powers to summon any person for examination or require such person to furnish information and produce any document or object in his possession or under his control.

2.8 Section 20 of the Ordinance empowers The Ombudsman and her officers to enter any premises of a scheduled organisation, inspect the premises and carry out on the premises any investigation within her jurisdiction.

Fig. 2.2

Powers of Investigation
• Summoning of witnesses
• Access to documents including classified documents
• Entry into premises
• Penalty for not cooperating in investigation

2.9 Under section 23 of the Ordinance, it is an offence to obstruct, without lawful excuse, The Ombudsman or her officers in the exercise of powers conferred by the Ordinance, fail to comply with their lawful requirements, make false statements or otherwise knowingly mislead them. Offenders are liable to a fine of $10,000 and to imprisonment for six months.

Investigation Reports

2.10 The Ombudsman must, under section 17 of the Ordinance, inform the complainant of the result of investigation.

2.11 The Ombudsman is empowered under section 16 of the Ordinance to report her findings, opinions and recommendations on completion of a full investigation. The organisation concerned will be given an opportunity to comment on The Ombudsman's findings. The final report will be given to the head of the organisation for information and implementation of her recommendations, where appropriate.

2.12 Unlike Court verdicts, The Ombudsman's recommendations are not binding. Yet, where the head of the organisation disagrees with her findings or refuses to accept her recommendations, The Ombudsman may consider submitting the report to the Chief Executive. Furthermore, where an organisation fails to implement or to act adequately on any of her recommendations, The Ombudsman may also report to the Chief Executive. Section 16(6) of the Ordinance requires that, within one month of such a report being submitted, or such longer period as the Chief Executive may determine, a copy of the report shall be laid before the Legislative Council.

Restrictions on Jurisdiction

2.13 The Ombudsman's purview is not all pervasive. Section 8, read with Schedule 2 to the Ordinance, specifies actions not subject to The Ombudsman's investigation, i.e. actions outside her jurisdiction.

Fig. 2.3

Examples of Actions not Subject to Investigation - Schedule 2 to the Ordinance
• Actions in relation to security, defence or international relations
• Legal proceedings or prosecution decisions
• Exercise of power to pardon criminals
• Contractual or commercial transactions
• Personnel matters
• Grant of honours, awards or privileges by Government
• Actions by the Chief Executive personally
• Imposition or variation of conditions of land grant
• Actions in relation to Hong Kong Codes on Takeovers and Mergers and Share Repurchases
• Crime prevention and investigation actions by Hong Kong Police Force or Independent Commission Against Corruption

2.14 Government policies and professional judgments are outside The Ombudsman's jurisdiction as they are not administrative actions *per se*. However, they are often subjects of complaints. The Ombudsman would scrutinise them carefully to see if there are administrative aspects that fall within her jurisdiction.

2.15 Section 10(1) of the Ordinance prescribes restrictions where The Ombudsman shall not conduct an investigation.

Fig. 2.4

Major Restrictions on Investigation of Complaint – section 10 (1) of the Ordinance
• Complainant having knowledge of subject of complaint for more than two years
• Complaint made anonymously
• Complainant not identified or traceable
• Complaint not made by person aggrieved or suitable representative
• Subject of complaint and complainant having no connection with Hong Kong
• Statutory right of appeal or remedy by way of legal proceedings (except judicial review) being available to complainant

2.16 Under section 10(2) of the Ordinance, The Ombudsman may decide not to investigate a complaint under certain circumstances.

Fig. 2.5
Circumstances Where The Ombudsman may Decide not to Investigate – section 10 (2) of the Ordinance
• Investigation of similar complaints before revealed no maladministration
• Subject of complaint is trivial
• Complaint is frivolous or vexatious or is not made in good faith
• Investigation is, for any other reason, unnecessary

2.17 My Office critically examines all in-coming complaints to establish whether they come within my statutory purview and whether they have a *prima facie* case to warrant investigation. Where The Ombudsman decides not to conduct or to discontinue an investigation, she must inform the complainant of her decision with reasons. Where possible, we still try to help the complainant by pointing out the appropriate avenues for redress.

2.18 It is at times not easy to demarcate the boundaries prescribed in Schedule 2 to the Ordinance. I take a liberal approach and "screen in" all points administrative in nature for scrutiny and inquiry where appropriate. My aim is to take every opportunity to identify areas for improvement in public administration.

2.19 Some of the restrictions prescribed by section 10(1) of the Ordinance are discretionary. I exercise discretion with caution and in accordance with the provisions of the law in deciding whether or not to conduct, or to discontinue, an investigation.

Need for *Prima Facie* Evidence

2.20 From time to time, members of the public send us messages to express dissatisfaction with certain organisations but produce no concrete details. While our role requires us to investigate complaints, we cannot do so unless complainants at least tell us what has actually happened, how they are aggrieved and by what or whom. A mere expression of opinions or suspicion about something amiss does not make a *prima facie* case justifying our investigation. We would, therefore, have to ask the complainant for further details to support the complaint before deciding whether to use our limited resources to pursue it.

Secrecy Requirement

2.21 We are duty-bound to explain to the public how we go about our work for a proper understanding of our procedures and practices. However, all members of my Office and I, as well as my advisers, are bound by The Ombudsman Ordinance, under penalty, to maintain secrecy over specific cases. We must keep strictly confidential all matters that come to our knowledge in the exercise and execution of our functions. The aim is to ensure any person or organisation providing information to our Office can do so without reserve and without fear of possible consequences from the disclosure of their identity or related data. Breach of this statutory requirement is a criminal offence, which carries a maximum fine of $50,000 and imprisonment for two years.

2.22 From time to time, Legislative Councillors and civic leaders, members of the public and the media refer complaints to me, expecting to be informed of the progress of our processing. We are grateful for their support. However, we are bound by law not to discuss with, or to disclose to, third parties the processing or

the outcome of any case. Except for official publication of an investigation report in anonymised form, we cannot and will not respond to any enquiry on individual complaints other than from the parties concerned. Again, I thank all who have referred cases to my Office and appreciate their understanding of and respect for our secrecy code.

2.23 Before starting inquiries, we always seek the complainants' consent to obtain their personal data from the organisations concerned and to reproduce their documents to relevant organisations for processing their cases. This safeguards the privacy of their personal data. Where a complainant does not give consent, we may not be able to pursue his/her case.

2.24 The secrecy code is the cornerstone of the ombudsman system. It is strictly observed by all of us in discharging our duties.

The Ombudsman's Discretion

2.25 The Ordinance gives The Ombudsman discretion to undertake or not, continue or discontinue an investigation. Exercise of this discretion enables me to make the best use of our resources for the benefit of the community.

2.26 Owing to my statutory independence, my decision on any case is final. Anyone not satisfied with my decision may request my Office to review the case. If the request is acceded to, I will normally assign a different investigator to assist in the review for the sake of objectivity. Alternatively, the complainant may apply to the Court for judicial review.

Jurisdictional Review

2.27 In my Annual Report of 2004, I stated that with 15 years behind us since our establishment in 1989, it was time to review the functions and purview of The Ombudsman. I am pleased to say that such a review of The Ombudsman's jurisdiction has commenced. Based on our operational experience and practices of my counterparts overseas, we are examining the need for and feasibility of the points below for proposals to the Administration:

(a) adding more organisations to Schedule 1 to the Ordinance to place them within my purview;

(b) relaxing some of the restrictions on my investigative powers in Schedule 2 to the Ordinance; and

(c) resolving some of the difficulties or uncertainties encountered by our officers in discharging their duties.